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Supreme Court, U.S.
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In The

Supreme Court of the United States

JASON SCOTT COLETTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the recording of a statement made by the Government's key witness/informant to both federal and state officers working in tandem as part of a joint task force, but supposedly held in the possession of the state officers must be produced to the defense under the Jencks Act after repeated requests by the defense and after the United States attorney assumed the responsibility of obtaining it.

2. Whether the prosecutor's knowledge that a witness statement has been obtained by a state and federal joint investigatory body renders the statement within the possession of the prosecutor for purposes of the Jencks Act.

3. What level of factual inquiry must be conducted by a district court in determining whether a statement falls within the Jencks Act, whether it was in the possession of the Government, and whether the prosecutor acted in bad faith in failing to turn it over?

4. How the harmless error rule should be applied to cases in which the Government fails to turn over Jencks Act materials in a timely fashion thus precluding the use of the materials at trial?

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OPINIONS BELOW

The decision of the Court of Appeals affirming Mr. Colette's judgment of conviction and rejecting the arguments raised by this Petition is unreported. App. 1-6.

In an unreported order dated November 22, 2010, the Court of Appeals denied Mr. Colette's Petition for Rehearing and Petition for Rehearing En Banc. App. 34-38.

JURISDICTION

The Court of Appeals for the Ninth Circuit denied Petitioner's appeal on August 17, 2010. App. 1. The Court of Appeals denied Petitioner's Petition for Rehearing and Petition for Rehearing En Banc on November 22, 2010. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §3500. Demands for production of statements and reports of witnesses.

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena,

discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of

such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means –

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of

an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

STATEMENT OF THE CASE

Following a trial in the United States District Court of Alaska, Petitioner Jason Colette was convicted of possession with intent to distribute cocaine and distribution of cocaine under 21 U.S.C. §841. App. 10. He was acquitted of Counts 3 and 4 which alleged violations of 18 U.S.C. §924(c)(1)(A)(i) and 18 U.S.C. §924(c)(1)(B)(ii). This petition follows the Ninth Circuit's denial of Mr. Colette's direct appeal and its subsequent denial of his petition for rehearing. App. 1-6, 34-35. The District Court of Alaska had jurisdiction pursuant to the above cited federal criminal statutes. Following that trial, the District Court empaneled a new jury to hear additional evidence pertaining to Counts 6 and 7 regarding the forfeiture of $38,848.00 in U.S. currency and four firearms. Following the presentation of evidence in a four-day forfeiture trial on these Counts, the jury determined that the currency and three of the four guns should be forfeited pursuant to 21 U.S.C. §853(a)(1) and §853(a)(2).

At the culmination of all trial proceedings, Mr. Colette filed a motion for new trial pursuant to *Fed.*

R. Crim. P. 33(b)(1). The District Court denied this motion.

A. The Search Of Eugene Johnson's Residence

Early in the morning on November 28, 2005, federal and state authorities, working in conjunction, executed a search warrant on two residences associated with Eugene Johnson -- one in which Johnson and his girlfriend lived and another just a few blocks away where Johnson's parents lived. (Excerpts of Record (hereinafter "ER") Pg. 9).[1] This search warrant reflected the culmination of an ongoing investigation into Johnson's drug dealing. (ER 1, Pg. 27). Part of the considerable foundation of evidence contributing the finding of probable cause for the issuance of that search warrant was a controlled buy in which law enforcement officers arranged for an informant to purchase 44 grams of cocaine from Johnson. (ER 1, Pg. 27). The cocaine purchased during this controlled buy appeared to have come off of the corner of a brick suggesting that Johnson was close to the original

[1] Some documents which were part of the record below have not been included in the attached Appendix. To do so would have been prohibitively expensive for the Colette family. These documents are already in the public record as they were all included in the Excerpts of Record prepared for the Ninth Circuit. As necessary, this Petition will cite to the Excerpts of Record for reference to police reports, the transcript of the recorded interview with Eugene Johnson, and letters from Government counsel regarding the existence of Jencks Act material.

source and that he may have had in his possession a kilogram of cocaine at that time. (Transcript (hereinafter "TR") III, 8/1/06, Pg. 1-192 – 1-193).[2]

According to the police report filed by Officer Jess Carson, when officers arrived at his house, Johnson and his girlfriend were present, however no cocaine was recovered. (ER 1, Pg. 9). Officers did find several guns, marijuana paraphernalia, $1,200 in cash, two bottles of Inositol powder (a commonly used cutting agent for cocaine), and a digital scale – all evidence indicative of cocaine sales. (ER 1, Pg. 9). Recognizing that something unusual was afoot, officers asked Johnson why there were no narcotics in his residence. (ER 1, Pg. 9). Johnson informed the officers that "he had been warned that the police were coming but would not inform [Officer Carson] how he knew." (ER 1, Pg. 9).

Despite the lack of evidence obtained through the execution of the search warrant, the investigating

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[2] TR I is the transcript of the preliminary hearing on December 8, 2005; TR II is the transcript of the oral arguments on defendant's motions heard April 20, 2006; TR III is the transcript of the first day of the criminal trial on August 1, 2006; TR IV is the transcript of the second day of the criminal trial on August 2, 2006; TR V is the transcript of the third day of the criminal trial on August 3, 2006; TR VI is the transcript of the sentencing hearing on March 23, 2007; TR VII is the transcript of the first day of the forfeiture trial on September 4, 2007; TR VIII is the transcript of the second day of the forfeiture trial on September 5, 2007; TR IX is the transcript of the third day of the forfeiture trial on September 6, 2007; TR X is the transcript of the fourth day of the forfeiture trial on September 7, 2007.

officers exerted pressure on Johnson to inform on someone else by using the controlled buy that had taken place as leverage against him. The investigating officers conducted and recorded a long, two-part interview with Johnson (the transcript of which is 67 pages long). (ER 1, Pg. 30-98). The officers present for this interview were Sgt. Wall, an Alaska State Trooper, Agent Cohoon, a federal agent of the bureau of Alcohol, Tobacco, and Firearms, and Agent Foran, a federal Drug Enforcement Administration agent. (TR IX, 9/6/07, Pg. 3-74).

B. Application for the Search Warrant Of Jason Colette's Residence.

Because the evidence procured through the execution of the search warrant at Johnson's house was so meager, the investigating officers convinced Johnson to provide them with a new target. That target became Jason Colette. Johnson then showed the officers where Mr. Colette lived and they went directly to the courthouse to apply for the search warrant. (ER 1, Pg. 103). Mr. Colette was a well-respected small business owner and was not under investigation for distribution of narcotics prior to Mr. Johnson's statements to the officers. No other investigation of Mr. Colette was carried out prior to the search warrant hearing.

C. Requests For Jencks Material

Trial counsel for the defense made repeated requests to obtain all of the materials that the

Government was required to turn over. These materials were indispensable to the defense in its preparation for the examination of witnesses and, yet, these requests were routinely disregarded by the prosecution.

As early as the preliminary hearing on Thursday, December 8, 2005 during the cross-examination of Agent Foran, Mr. Michael Stepovich, then counsel for Mr. Colette, requested that the Government turn over "any Jencks material that would have been generated by the officer." (TR I, 12/8/05, Pg. 21). He went on to say, "If there's any more material than what the government gave us prior to this questioning, we would request that." (TR I, 12/8/05, Pg. 21). The Assistant United States Attorney handling the case, Mr. Bryan Schroder replied to that court that the Government had already provided the one and only statement that was produced by Special Agent Foran. (TR I, 12/8/05, Pg. 22).

On April 20, 2006, Mr. Rex Butler, new counsel for Mr. Colette, requested that the court "order the government to turn over the notes about the Johnson investigation and arrest." (TR II, 4/20/06, Pg. 40). At that same hearing, in addition to requesting the notes that the officers made during their interview with Johnson, Mr. Butler also requested that the tape recording of the interview be produced. (TR II, 4/20/06, Pg. 49).

During the time that elapsed between that hearing in April and the commencement of the jury trial which began on August 1, 2006, neither the notes that were taken during the interview with

Johnson, the recording of the interview, or Agent Cohoon's grand jury testimony were ever turned over to the defense. On July 27, 2006, just days before the trial was to commence, Mr. Schroder faxed a letter to Mr. Butler stating that he "prepared copies of possible *Giglio* material consisting of the State of Alaska indictment and attachments of potential witness Eugene Johnson along with State of Alaska reports and search warrant information." (ER 1, Pg. 140). This packet did not include the recordings of the interviews the officers conducted with Mr. Johnson or any of the other previously requested Jencks materials. The next day, July 28, 2006, Schroder sent another fax, this time stating, "Enclosed are the following additional Jencks Act materials: Eric Cohoon- 13 pages. Other applicable material has been provided in previous discovery." (ER 1, Pg. 142). The obvious implication of this letter is that there was no other outstanding Jencks materials. Still, in spite of these misleading communications, Mr. Butler persisted in requesting the Jencks material that he knew to exist, and the Government consistently failed to produce the requested materials.

On the first day of trial, Mr. Butler renewed his request for any notes or recordings generated during the interview with Johnson. (TR III, 8/1/06, Pg. 149).

> MR. BUTLER: Okay. If I could inquire – I mean, I know that counsel doesn't have to give any verbatim statements until after the witness testifies, but if

Mr. Johnson is going to testify against my client, will we be getting the statements that he made to the state when he was originally arrested and what have you?

MR. SCHRODER: I know of no other statements other than the defense has. Assuming Mr. Butler has all the discovery that we've turned over.

THE COURT: Well –

MR. BUTLER: Counsel says he doesn't have them, but –

THE COURT: Do they – I mean, are there statements or aren't there statements?

MR. SCHRODER: He was not arrested originally, and – at all – he wasn't arrested.

THE COURT: Okay.

MR. SCHRODER: But I mean that probably is neither here nor there. I mean, my understanding was there were – whatever was put into the reports, and the same day that he was – this all happened, he was taken

to testify in front of the state magistrate.

THE COURT: Okay.

MR. SCHRODER: And I believe that we've provided that. There's a transcript of that and there's also the recording of that.

THE COURT: Well, if it turns out that you don't have something that you're entitled to, then his cross-examination can continue over until tomorrow morning.

(TR III, 8/1/06, Pg. 149-150).

In spite of the fact that the police report from the raid of Mr. Johnson's residence clearly states that the interview was recorded, the Government still maintained that they had turned over all relevant Jencks materials even though both parties knew that no effort had been made to provide either the tape recording or the notes from that or subsequent interviews. The court's order notwithstanding, these materials were not produced at all during the original trial.

At the sentencing hearing, the request for Jencks materials was made once more, this time by Mr. Colette's new attorney, David J. Cohen. (TR VI, 3/23/07, Pg. 30). Referring to the interviews with

Eugene Johnson, Mr. Cohen pointed out once more that the police report "clearly says" they were recorded. (TR VI, 3/23/07, Pg. 30). Mr. Cohen also pointed out that the recorded interviews were necessary to verify whether certain statements Johnson made at trial had been made previously or whether they were manufactured in anticipation of trial.

At that same hearing, Mr. Cohen once again requested that all Jencks materials be turned over to the defense. (TR VI, 3/23/07, Pg. 48). Emphatically, Mr. Cohen moved the court to order that "the government provide to the defense any and all statements that have not already been provided, to the extent there are any." (TR VI, 3/23/07, Pg. 49). It was already clear that the requested interview tapes had yet to be turned over, but Mr. Cohen, out of caution due to the difficulty counsel for Mr. Colette had experienced thus far, made a general request for all materials. This general request was made once more in the trial memorandum submitted by the defense on August 20, 2007.

On the second day of the forfeiture trial, Mr. Cohen once again asked for additional Jencks materials. (TR VIII, 9/5/07, Pg. 5). At that time, Mr. Cohen also requested grand jury testimony. (TR VIII, 9/5/07, Pg. 5). In response to this request, Assistant United States Attorney, Mr. James Barkeley, replied that he would attempt to obtain the grand jury testimony and provide it to the defense that day. (TR VIII, 9/5/07, Pg. 11). Later that same day, Mr. Cohen stated on the record that the Government represented to him that a recording of

the grand jury testimony would be provided to the defense that day – long after it should properly have been produced. (TR VIII, 9/5/07, Pg. 160). A recording of the grand jury proceeding at which Agent Cohoon testified was, in fact, produced for the defense that evening.

The following day, the issue still unresolved, Mr. Cohen, having just received the recording of the grand jury testimony the previous evening, specifically asked Agent Cohoon if he took notes during the interviews with Eugene Johnson. (TR IX, 9/6/07, Pg. 129). When confronted with the fact that he referenced the notes during the grand jury proceedings, Agent Cohoon, acknowledged that he must have in fact taken notes. (TR IX, 9/6/07, Pg. 129). As a result, the court later ordered the Government once again to produce the remaining Jencks materials requested by the defense. (TR IX, 9/6/07, Pg. 161). Mr. Cohen also pointed out once more on the record that the recordings of the Johnson interviews had yet to be produced by the Government. (TR IX, 9/6/07, Pg. 160). Later that day, during the same proceedings, the Government finally complied with the request to produce Agent Cohoon's notes from the interview. (TR IX, 9/6/07, Pg. 178). This was, of course, after Agent Cohoon already testified for the last time, and consequently the defense was unable to make effective use of these notes.

After all the evidence had been taken in the trial and the jury was already deliberating, the Government finally turned over the tape from the Johnson

interviews. (TR IX, 9/6/07, Pg. 62). This was nearly two years after the original request for Jencks materials had been made.

REASONS FOR GRANTING THE PETITION

This case presents an issue that requires this Court to define the contours of the Government's obligations under the Jencks Act in the context of a joint state/federal investigation. More explicitly, this Court should step in and resolve for the lower courts the exact meaning of the phrase "in the possession of the United States." While most of the Circuits (including the Ninth, where this case originated) have made no formal pronouncement on the precise issue presented here, in *United States v. Heath*, 580 F.2d 1011 (10th Cir. 1978), the Tenth Circuit squarely confronted it and, recognizing the potential for Governmental abuse if left undefined, resolved the issue in accord with the interpretation presented here by Mr. Colette. Several other courts such as the Second, Fourth, and Eighth Circuits, have issued opinions that echo the analysis presented by the Tenth Circuit in *Heath*. Other Circuits such as the Third, Fifth, and the Ninth have tended to adhere to a strict interpretation of the possession requirement.

The Ninth Circuit's Jencks Act case law lacks the proper machinery to resolve this issue, however. The panel that decided this case, dismissed Mr. Colette's argument with a single sentence and a citation to a case that is wholly distinguishable from the facts

presented here. The complete lack of analysis in that opinion betrays the impotence of the Ninth Circuit's law on this issue and its willingness to avoid confronting the very important argument that Mr. Colette placed before that court.

This Court has been noticeably silent regarding the Jencks Act in recent years. The last time this Court engaged in any thorough analysis of the act was in 1976 with the case of *Goldberg v. United States*, 425 U.S. 94 (1976). With the increase of cooperation between state and federal authorities, the circumstances of this case are likely to play out repeatedly in the lower courts. For this reason, this Court should assume the responsibility of clarifying the statutory language and resolving the split.

In addition to resolving the aforementioned split in circuit authority, this Court should also clarify the manner in which a district court must determine vital factual issues such as whether the prosecution has acted in bad faith and whether or not a statement is actually in the possession of the Government. In the present case, the lower court conducted no hearing on this issue, instead drawing its conclusions solely from the statements of the prosecutor.

Finally, the Circuits also need guidance as to the application of the harmless error standard for Jencks Act violations that cannot be cured at trial. Several courts have approached this issue, but there seems to be no uniform notion of how to interpret the harmless error standard in this context.

I.

THIS COURT SHOULD RESOLVE A CIRCUIT SPLIT CONCERNING THE APPLICATION OF THE JENCKS ACT TO STATEMENTS OBTAINED DURING A JOINT (STATE AND FEDERAL) INVESTIGATION.

The discussion portion of the Ninth Circuit's memorandum opinion in this case opens with the statement: "The most serious issue is whether we must reverse because the government violated the Jencks Act, 18 U.S.C. §3500, by failing to timely produce (1) an audio tape of a police interview with a confidential informant; (2) the grand jury testimony of a federal agent; and (3) the handwritten notes the agent took during a different interview with the informant." App. 2.

While the Ninth Circuit agreed with Mr. Colette that the latter two pieces of evidence were withheld from the defense in violation of the Jencks Act, the panel dismissed the first (and most important) with a single sentence: "The government did not violate the Jencks Act when it failed to produce the audio tape of the informant's police interview during the criminal trial, because the tape was in exclusive possession of state authorities." App. 2-3. In support of this proposition the panel cited only one Ninth Circuit case, *Beavers v. United States*, 351 F.2d 507, 509 (9th Cir. 1965) which is 45 years old and does not resolve or even confront the specific factual issues raised here. App. 3. Indeed, there is no Ninth Circuit case that confronts the specific issues raised by Mr. Colette on

appeal. There is, however, substantial case law emanating from other circuits that fully supports Mr. Colette's interpretation of the Jencks Act in this specific factual context.

In *United States v. Heath*, 580 F.2d 1011 (10th Cir. 1978), *cert. denied*, 439 U.S. 1075, (1979), the Tenth Circuit, on facts materially identical to those in this case, determined that statements, although held in the custody of the local police, were within the possession of the Government for Jencks Act purposes. *Id.* at 1018-19.

The statements at issue in *Heath* were made by prosecution witnesses who were given immunity in exchange for their testimony. *Id.* at 1014-15. Through its cross-examination of the witnesses, the defense learned that there were witness statements that the Government withheld. *Id.* at 1018. The Government disavowed any knowledge of the existence of these statements. *Id.* The trial court ordered the Government to provide the defense with the statements and allowed for additional witness examination related to their contents. *Id.*

The Tenth Circuit rejected the notion that, under the specific circumstances of that case, the Government could claim that it was not in possession of the statements for Jencks Act purposes:

> It seems obvious to us that a witness, who has made a statement to state officers, is subject to the Act. It will not do for the district attorney to stand on technicality and

> say that he does not have actual possession of it.

Id. at 1018-19. The Tenth Circuit qualified its holding by limiting it to cases in which (1) there is close cooperation between state and federal authorities and (2) the federal prosecutor assumes responsibility for producing the statements:

> At least under the circumstances of this case there was close cooperation between state and local officers and the federal prosecutor. Where the prosecutor, in his statements to the court, assumed the responsibility for obtaining any statements in the possession of the state officers, the government could not subsequently disclaim responsibility for failure to disclose.

Id. In arriving at its holding, the Tenth Circuit acknowledged the conflicting authority among the circuits on this issue. *Id.* at 1019. (fn. 1).

The factual background surrounding the present case is far more comparable to *Heath* than to the *Beavers* case cited by the Ninth Circuit in its opinion in this case. As in *Heath*, the witness whose statement is at issue here was a criminal suspect who was cooperating with the Government in exchange for favorable treatment. In both *Heath* and the present case, the Government claimed to have no knowledge of the statements, but their existence was eventually discovered only through the defense's examination of the witnesses.

Most importantly, both of the essential factors that the Tenth Circuit depended on for its decision were present in Mr. Colette's case as well. First, the Tenth Circuit relied upon the close cooperation between the federal prosecutor and the local authorities. That factor was also present in Mr. Colette's case which evolved out of an investigation by a joint task force comprised of federal and local law enforcement. The statement at issue in this petition was recorded in the presence of multiple federal and local officers all of whom eventually testified at trial.

Additionally, here, as in *Heath*, the United States attorney that tried this case accepted the responsibility of obtaining the recording when it was requested by the defense on the first day of the criminal trial. (TR III, 8/1/10, Pg. 150, Ln. 19 – Pg. 152, Ln. 16). Government counsel never objected on the basis that he was not obligated to do so under the Jencks Act. When defense counsel specifically requested the recording of the interview with Mr. Johnson, Government counsel agreed to inquire further about the tapes stating, "I will go to the officers and specifically . . . ask that question to . . . confirm." (TR III, 8/1/10, Pg. 152, Ln. 5-10). The court reiterated this: "what we're being told is it – that [the recording] does not exist and he's going to check again to see if one exists, and if one exists, he'll provide it to you." (TR III, 8/1/10, Pg. 152, Ln. 11-13). The Government assented without objection to the defense's and the court's assertions that the Government was responsible for obtaining and turning over the recordings.

Other circuit court decisions support the conclusion reached by the Tenth Circuit in *Heath*. In *United States v. Bermudez*, 526 F.2d 89 (2nd Cir. 1975), *cert. denied*, 425 U.S. 970 (1976), the Second Circuit affirmed a lower court's denial of a motion for new trial on the basis that the statements at issue were not the product of a joint investigation between the state and federal investigatory agencies. Though the defendant claimed the existence of a joint investigation, the Government produced a federal agent and a local police detective who both testified that there was no such cooperative effort. *Id.* at 100 (fn. 9). The trial court reviewed the state investigation files in camera and independently corroborated this assertion. *Id.* The court concluded that, because there was no record of an actual joint investigation, the materials could not have been deemed to have been in the possession of the Government for Jencks Act purposes. *Id.*

In *United States v. Paternina-Vergara*, 749 F.2d 993, 995 (1984), *cert. denied*, 469 U.S. 1217 (1985), the Second Circuit examined a case in which the investigation of the defendants was begun by Canadian authorities and later directed by the United States DEA. The defendants claimed that the Government violated the Jencks Act by failing to produce several documents that were in the possession of the Canadian investigatory agency. *Id.* at 996. The Second Circuit, relying in part on its decision in *Bermudez*, stated:

> If there had been no cooperation between Canadian and United States officials in the pending case, we would not hesitate to follow the Ninth Circuit's *Friedman* decision and apply in the foreign context the ruling we made in *Bermudez* in the state context.

Paternina-Vergara, 749 F.2d at 997. Central to the court's reasoning was the possibility that a "joint-investigation might afford an opportunity for evading constitutional requirements applicable to United States officials." *Id.* at 998 (citations omitted). Ultimately the court held that "in the course of a joint-investigation between the United States and foreign law enforcement officials the most the Jencks Act requires of United States officials is a good-faith effort to obtain the statements of prosecution witnesses in the possession of a foreign government." *Id.* The court specifically found it persuasive that it "was not confronted with a situation where United States officials attended an interview of a prosecution witness and made no report of the interview, preferring a report to be made by a foreign official in the hope of avoiding Jencks Act production." *Id.* Of course, that is precisely what happened in the present case.

Other courts' holdings in the face of similar facts have been in accordance with the Tenth and Second Circuit's analyses. *See, United States v. Silva*, 745 F.2d 840, 845 (4th Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985), ("There is no evidence of close cooperation between the South Carolina prosecutors and the Florida grand jury so as to justify a finding that the

statements were technically made to Government agents."); *United States v. Moeckly*, 769 F.2d 453, 463 (8th Cir. 1985) ("The Jencks Act does not apply to statements made to state officials when there is no joint investigation or cooperation between state and federal authorities."); *Lyles v. United States*, 879 A.2d 979, 984-86, (D.C. 2005) (Same).

In contrast to the cases cited above, some other courts have embraced a more literal interpretation of the words "in the possession of the United States." None have done so on facts resembling those of the present case, however.

In *United States v. Weaver*, 267 F.3d 231, 245 (3rd Cir. 2001), *cert. denied*, 534 U.S. 1152 (2002), the Third Circuit concluded that there was no Jencks Act violation where the "District Court concluded that there was no evidence that the written descriptions were ever in the custody of federal law enforcement." In that case, the defendant argued that the Government should have turned over descriptions written by tellers following a bank robbery. *Id.* When asked, however, the tellers could not confirm to whom they turned over the written statements and the agents and officers who testified indicated that they had not seen the written statements. *Id.*

The Fifth Circuit has adopted what is, perhaps, the most strict interpretation of what it means for a statement to be in the possession of the United States Government. That court, in dicta, stated that a statement to a state officer would not fall under

the purview of the Jencks Act because the state officers do not "qualify as agents of the federal government." *United States v. Smith*, 433 F.2d 1266, 1269 (5th Cir. 1970), *cert. denied*, 401 U.S. 977 (1971). This sentiment was expressed even more clearly in *United States v. Trevino*, 556 F.2d 1265, 1270 (5th Cir. 1977). There, the Fifth Circuit held that the probation report pertaining to one of the Government's key witnesses was not Jencks material. *Id.* at 1271. The court held that "3500(b)'s use of the term 'United States' is shown to mean the *prosecutorial* division of the government." *Id.* Later, in *United States v. Escobar*, 674 F.2d 469, 478 (5th Cir. 1982), the Fifth Circuit entertained a defendant's assertion that a state police officer's daily log of the cases he worked should have been turned over pursuant to the Jencks Act. The Fifth Circuit, relying on its previous statement in *United States v. Smith*, refused to indulge the defendant's request to adopt a rule more akin to the Tenth Circuit's. *Id.*

The Eleventh Circuit has adopted a similar interpretation. In *United States v. Cagnina*, 697 F.2d 915, 922 (11th Cir. 1983), *cert. denied*, 464 U.S. 856 (1983), that court held that state and federal testimony of two Government witnesses was never in the hands of the prosecution and, therefore, not Jencks material. The court concluded its analysis by saying, "[b]ecause neither [of the witness'] testimony was in the possession of the prosecutor and both could have been obtained by the defendant with reasonable

diligence, the Government had no obligation to produce them." *Id.* at 922-23.

While the Fifth Circuit seems to have embraced a bright-line rule regarding this issue, the cases within that circuit and the others do not involve the same level of integration between state and federal authorities that the present case depicts. Here, federal agents were working side-by-side with the state investigators. The same agents and officers were present during the raid of Mr. Johnson's home in the early morning hours. The interrogation that took place following this relatively unsuccessful raid was long with the transcript taking up some 67 pages. During that interrogation, both the federal agents and state officers continuously exerted pressure on Johnson to give up someone else. The police report subsequently delivered to the defense indicated that this interview was recorded and the defense made the appropriate requests for it. Unlike the defendants in *Cagnina*, Mr. Colette was not able to simply order the production of the recording from a third source such as a court. Here, Mr. Colette was entirely at the mercy of the federal prosecutor who initially declared that the recordings did not exist.

None of the cases cited above involve material prepared by both state and federal authorities during the course of their investigation of the defendant. Such a situation, which is by no means unique to this case, presents a major fissure in the structure of the Jencks Act. To apply the bright-line rule that Jencks only encompasses material actually in the physical

hands of the federal prosecutor is to effectively grant federal prosecutors a mechanism by which they can shield themselves from having to produce damaging statements made during joint investigations. A federal prosecutor would be legally entitled to simply refrain from obtaining such statements as long as they are kept in the state office no matter how integral federal law enforcement agents were to the investigation.

II.

THIS COURT SHOULD CLARIFY WHETHER A FEDERAL PROSECUTOR'S ACTUAL KNOWLEDGE OF THE EXISTENCE OF STATEMENTS RENDERS THEM WITHIN THE JENCKS ACT IN SITUATIONS IN WHICH THEY ARE READILY ACCESSIBLE TO THE GOVERNMENT.

In *United States v. Fort*, 472 F.3d 1106 (9th Cir. 2007), *cert. denied*, 552 U.S. 948 (2007), the Ninth Circuit examined "whether investigative reports prepared by a local police department prior to a federal prosecutor's involvement qualify for the discovery exemption created by *Rule 16(a)(2)*" of the *Federal Rules of Criminal Procedure*. *Id.* at 1109. In its analysis, this Court looked to case law interpreting the Government's obligation under the Jencks Act in order to define the Government's obligation under *Rule 16*. Neither that case nor the other Ninth Circuit cases cited in *Fort* address a situation resembling the current one featuring an investigation that was carried out jointly and concurrently by federal and

state authorities. *See e.g., United States v. Higginbotham,* 539 F.2d 17 (9th Cir. 1976) (Photos used in local police investigation later taken over by the federal Government were not discoverable under Jencks); *Beavers v. United States,* 351 F.2d 507 (9th Cir. 1965) (Recording of witness statements to local police "*and at a subsequent date made to F.B.I. agents*" was not within the Government's possession). (Emphasis added); *United States v. Gatto*, 763 F.2d 1040, (9th Cir. 1985) (Government not in possession of documents for *Rule 16(d)(2)* purposes when documents were discovered 2 years earlier by state authorities and Government was not made aware of their existence until "a few weeks before the trial was to begin."); *United States v. Friedman*, 593 F.2d 109 (9th Cir. 1979) (Government not required to turn over diary seized and held by the Government of Chile).

Mr. Colette's case differs markedly from all of the cases cited above. In this case, the entire investigation was conducted by both federal and state officers. Sgt. Wall, as well as DEA Agent Foran and ATF Agent Cohoon, were all present during the undercover investigation into Mr. Johnson's drug activities, the search of Mr. Johnson's residence, the arrest of Mr. Johnson, and the post-arrest interview of Eugene Johnson. All of the officers were aware that the interview was recorded. The Government cannot claim it was unaware of the tapes when Government law enforcement agents participated in the interview itself and the same agents later testified at trial. Nor

can the Government hide behind the notion that just because the tapes were stored with the state law enforcement agency, it is absolved of any responsibility for producing them when the statements recorded on those tapes were the most important evidence giving rise to the criminal charges at the heart of the present case.

As this Court said in *Fort*, case-law interpreting *Rule 16* is an appropriate prism through which to view the Government's obligations under the Jencks Act. In *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989), *cert. denied*, 493 U.S. 858 (1989), the Ninth Circuit held that, in the context of *Rule 16(a)(1)(C)*, interpretation of the phrase "in the possession of the government" should "turn on the extent to which the prosecutor has knowledge of and access to the documents sought by the defendant in each case." This is the correct standard to apply to the present case. The Government, when it is obviously aware of Jencks material that was obtained through the combined efforts of state and federal agents, should not be permitted to avoid its responsibility to turn over this material simply because it is held by the state law enforcement agency with which the federal agents were intimately working.

In *United States v. Wallace*, 848 F.2d 1464, 1470 (9th Cir. 1988), that court further clarified what it means for the Government to be "in possession" of Jencks materials. In that case, a cooperating witness, Doris Sterling, testified in order to avoid drug sales charges. *Id.* at 1467. During her trial testimony,

Sterling revealed that she utilized notes when testifying before the grand jury. *Id.* at 1470. The Government argued that it never had possession of the notes and the lower court agreed. *Id.* In oral argument on appeal, the Government conceded that "it was aware of Sterling's use of notes." *Id.* The court found that the Government's constructive possession was potentially sufficient to overcome the Government's prior argument that it was not "in possession" of the notes for purposes of its obligations under the Jencks Act and consequently remanded the case to the district court. *Id.* at 1471. (fn. 7). Central to the court's holding was the fact that the witness' testimony was "the critical evidence establishing appellant's participation in the heroin distribution network . . . " *Id.* The court went so far as to note that, "If Sterling's notes cannot be produced for the district court's review, then reversal may be warranted." *Id.*

The present case is conceptually identical. The tapes and notes of the interviews with Johnson were critical to conducting a full cross-examination. Johnson, like Sterling, was the primary witness against Mr. Colette. The Government's case against Mr. Colette as well as Mr. Colette's ability to raise a defense depended entirely upon the testimony of Mr. Johnson. Any impediment to conducting a full cross-examination of Mr. Johnson should be construed as reversible error. In the present case, Mr. Colette was effectively denied his right to confront witnesses under the Sixth Amendment as a result of the Government's persistent refusal to turn over the tapes of

the officers' interviews with Johnson. The Government was aware of the recordings from the beginning of the case because counsel for Mr. Colette repeatedly pointed out to the Government and the court that the officers stated that the interviews were recorded. The Government cannot convincingly argue that it was not made aware of the existence of the tapes. Instead, it simply chose not to pursue the acquisition of the tapes.

United States v. Polizzi, 801 F.2d 1543 (9th Cir. 1986) illustrates the boundaries of the Government's responsibility for turning over items in the custody of local authorities under the Jencks Act. As with many of these cases, the Jencks Act materials alleged not to have been turned over pertained to a witness with a "long criminal record" who was testifying on the Government's behalf. *Id.* at 1546. The defendant alleged that the Government failed to turn over certain documents pertaining to the witness' 1982 conviction for wire fraud. *Id.* at 1552. The particular documents the defendant complained were not turned over were: "a statement made by [the witness] during his sentencing in the 1982 wire fraud case" and "the sworn affidavit [the witness] provided in support of his motion for a new trial in the 1982 wire fraud case." *Id.* The prosecutor contacted the Los Angeles Strike Force and requested any materials related to the witness' case. *Id.* After receiving these documents, the Government turned over to the defense everything it had in its possession. *Id.* This did not include the statement or the affidavit, however. *Id.* This

Court held that, for Jencks Act purposes, these items were not in the Government's possession because "the prosecutor neither received nor was aware of [the witness'] affidavit and sentencing statement." *Id.*

This demonstrates that the crucial element of the analysis is the Government's knowledge of the item. In the present case, the Government was (or should have been) completely aware of the tapes. The very same federal agents that testified at trial were also responsible for the investigation and were present at the time of the interviews. There is no way that the Government can convincingly claim to have been unaware of the existence of these interview recordings. And even if the Government claimed to be ignorant of these statements, such willful ignorance should not be tolerated when it merely provides the Government with a means of circumventing its responsibility under the Jencks Act.

The Fifth Circuit also acknowledged the potential for the prosecutor to assume the responsibility for evidence of which he has knowledge in *United States v. Trevino*, 556 F.2d 1265, 1270 (5th Cir. 1977). Although the court held that, at least when dealing with a probation report in the hands of the probation department, the word "government" only referred to the prosecution, it left open the possibility that other circumstances may produce different results. *Id.* at 1271. The court's dicta made it clear that were it "considering some type of report held by an arm of the government other than the probation officer – an investigative agency, for example – different

questions would be presented, those concerning the prosecutor's duty to disclose material not technically within his possession but to which he has ready access." *Id.* at 1272.

III.

THE DISTRICT COURT NEVER CONDUCTED ANY HEARING TO DETERMINE WHETHER THE RECORDINGS WERE ACTUALLY IN THE POSSESSION OF THE STATE AUTHORITIES OR WHETHER THE FAILURE OF THE GOVERNMENT TO TURN THE STATEMENTS OVER TO THE DEFENSE WAS IN BAD FAITH; THIS COURT SHOULD ORDER THE NINTH CIRCUIT TO REMAND THE CASE TO THE DISTRICT COURT TO CONDUCT SUCH A HEARING

As the Seventh Circuit has declared, an inquiry and specific finding related to the good faith or lack thereof on the part of Government counsel "are normally critical to determining that the government has not flouted the purpose of the Jencks Act." *United States v. Wables*, 731 F.2d 440, 447 (7th Cir. 1984). Even when applying the more rigorous interpretation of the Jencks Act a trial court must have some basis for concluding that the statements were, in fact, in the hands of someone other than the federal prosecutor. In this case, there was no factual basis for determining that the recording of the Johnson interview was always exclusively in the possession of the state authorities. The court seemingly relied entirely upon

the word of the prosecutor. This once more raises the potential that this interpretation of the Jencks Act may encourage prosecutorial misconduct.

The Ninth Circuit's opinion did not question the validity of the Government's assertion that the recordings were in the possession of the state officers. The Government's assertions related to the existence and whereabouts of this recording were suspect from the very beginning. These recordings were requested by the defense as early as April 20, 2006. (TR II, 4/20/06, Pg. 49). Initially, the Government claimed to have no knowledge of the existence of this recording even after it was pointed out that the police reports stated that a recording was made. (TR III, 8/1/06, Pg. 149, Ln. 16-18).

On the first day of trial, the defense inquired about its existence on the record. (TR III, 8/1/06, Pg. 149). The Government claimed that it had turned over all statements made by Mr. Johnson. (TR III, 8/1/06, Pg. 149, Ln. 16-18). Neither the Government, nor the court, objected on the ground that the recording was not in the possession of the Government. The court even suggested that, if the statement were not turned over, the cross-examination of Johnson could be postponed. (TR III, 8/1/06, Pg. 149-150).

The tape was finally turned over to Mr. Colette on the very last day of the forfeiture trial. (TR X, 9/7/07, Pg. 62). All of the evidence had already been submitted to the jury and no witnesses were recalled for additional cross-examination. When defense

counsel referred to the recording as Jencks material, there was no disagreement by either the court or the Government. (TR X, 9/7/07, Pg. 62, Ln. 23-25). The Government claimed to have only come into possession of the recording the previous day. (TR X, 9/7/07, Pg. 63, Ln. 2-6). The court heard no argument related to the factual circumstances surrounding the post-trial production of this important piece of evidence. (TR X, 9/7/07, Pg. 63, Ln. 8-9).

It is important to point out that it was an agent of the federal Government (who was also a witness in the case), Special Agent Cohoon, who delivered the recording to the defense. (TR X, 9/7/07, Pg. 63, Ln. 8-9). That Agent Cohoon delivered the recording is highly suggestive of the possibility that the recording was actually in the custody of the Government the entire time, or, at least, that the Government knew of its whereabouts and could have obtained it with ease. This evinces a strong likelihood of bad faith on the part of the Government.

This issue was discussed at length at oral argument before the Ninth Circuit, but the panel denied counsel's request to have the case remanded back to the district court for an evidentiary hearing as to whether the recording was or was not in the hands of the Government and whether the Government acted in bad faith by failing to obtain and turn it over. At a minimum, this Court should clarify what factual determinations must be made to support a lower court's determination that a statement is not "in the possession" of the Government for Jencks Act

purposes. This Court should therefore order the Ninth Circuit to remand the case to the district court with instructions to hold an evidentiary hearing on these issues.

IV.

THIS COURT SHOULD RESOLVE DISCREPANCIES BETWEEN THE CIRCUITS REGARDING THE APPLICATION OF THE HARMLESS ERROR ANALYSIS TO SITUATIONS IN WHICH THE GOVERNMENT FAILS TO TURN OVER JENCKS MATERIALS; THE ERROR IN THIS CASE WAS HARMLESS UNDER ANY STANDARD CURRENTLY EMPLOYED BY THE CIRCUITS.

In denying Mr. Colette's appeal, the Ninth Circuit concluded that, based on the Government's two other Jencks Act violations, "the district court should have stricken [Agent Cohoon's] testimony from the record of the criminal trial as a sanction for the Government's Jencks Act violations." App. 3. It further concluded that "the court's failure to do so, however, could not have made a difference in the case and was therefore harmless." *Id.*

The recording of Eugene Johnson's statement to the police cannot be dealt with so easily. Eugene Johnson was the only civilian witness of the four witnesses put forth against Mr. Colette. He testified that Mr. Colette was distributing cocaine and that he had purchased cocaine from Mr. Colette on many

occasions. None of the law enforcement witnesses had any knowledge of drug sales by Mr. Colette. The only source of evidence related to actual sales of cocaine came from Mr. Johnson.

Additionally, the statement that the Government failed to produce could have been used extensively for impeachment purposes. It contained an admission that Mr. Johnson possessed and used a lot of both cocaine and marijuana. While testifying, Johnson only admitted to use of the latter. It also fully demonstrated Mr. Johnson's intense level of anxiety as the officers threatened him for hours and showed that the officers persistently threatened to arrest Mr. Johnson's girlfriend for her assistance with his drug sales. It demonstrated his obstinance and the repeated lies that he told the investigating officers. His dishonest statements to the arresting officers contradicted much of what he said at trial and further damaged his credibility as a witness. The statement provided additional details surrounding a controlled buy from Johnson made by the police. It made it clear that Mr. Johnson knew in advance that the police were going to raid his home. He knew this because a source (who Johnson never revealed, but who was likely inside the police department) warned him he was about to be raided. It also provided further details showing that Johnson, after hearing that his home was going to be raided, moved his drug supply to another location. No defense attorney handling this case would fail to see in this statement tremendous opportunity for impeachment during cross-examination.

The reasoning that the panel applied to the Jencks violations related to Agent Cohoon applies with greater force to the statement by Mr. Johnson. Subsection (d) of the Jencks Act states that:

> If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

In cases in which the prosecutor acts in bad faith or there is no opportunity to cure the prejudice to the defendant, the appropriate remedy is to strike the testimony or order a mistrial. On these facts, this Court should have ordered a mistrial or, at a minimum, it should have stricken Mr. Johnson's testimony.

In *United States v. Wables*, 731 F.2d 440, 442 (7th Cir. 1984), the Seventh Circuit confronted a case in which, prior to trial, the prosecutor informed the defense that he had turned over all Jencks Act material. When defense counsel objected that he had not seen any Jencks material relating to one of the witnesses, the prosecutor informed him that no such material existed. *Id.* at 443. After trial testimony came out suggesting that the officers had taken notes during their interviews with witnesses, the court

ordered that the notes be produced for the court to inspect and determine if they fell within the Jencks Act. *Id.* The next day, after the witnesses had already testified, the prosecutor produced the notes. *Id.* at 444. Although defense counsel moved to strike the testimony, the trial court denied this motion, but allowed the defense to review the notes and recall the witnesses for additional cross-examination. *Id.* The Seventh Circuit held: "Since the record reveals no bad faith on the part of the government and since it was possible to eliminate any prejudice resulting from the tardy production of trial statements, we hold that the trial court was not limited to the sanctions listed in subsection (d) of the Jencks Act. We further hold that the court did not abuse its discretion by requesting the immediate production of the undisclosed statements and by granting the defense adequate opportunity to review the material and recross-examine government witnesses." *Id.* at 447-48.

After finding that the harm stemming from the Government's failure to produce some of the statements was adequately avoided, the court then turned its attention to statements related to a Government witness which were not turned over until after the trial had concluded. *Id.* With respect to such statements, the Seventh Circuit declared that "in cases involving the failure to produce Jencks Act statements during trial, this circuit has found harmless error only when it is 'perfectly clear' that the nondisclosure of Jencks Act statements did not prejudice the defendant." *Id.* at 448 (citing *United States v.*

Esposito, 523 F.2d 242, 247-48 (7th Cir. 1975), *cert. denied*, 425 U.S. 916 (1976)). The court ultimately held that the statements that were withheld until after the conclusion of trial were cumulative and therefore any error was harmless even under its heightened "perfectly clear" standard. *Id.* at 448-49.

In *United States v. Cardenas-Mendoza*, 579 F.3d 1024, 1031 (9th Cir. 2009), the Ninth Circuit offered one of the most recent interpretations of the district court's responsibility for imposing sanctions when confronted with a Jencks Act violation. The court stated that although sanctions are ordinarily "mandatory" a district court may elect to forego striking testimony in instances in which the "government acted in good faith *and* where a substitute for the missing statement is available." *Id.* The court clarified that "prejudice exists when no acceptable substitute or summary of the missing statement is available" and that "the government's good faith alone does not excuse production under the Jencks Act." *Id.* at 1032. After conducting the analysis described above, the Ninth Circuit assessed whether or not the error was harmless. *Id.* The *Cardenas-Mendoza* court acknowledged that the Ninth Circuit has "found a Jencks Act error not to be harmless when the witness's testimony was key to the prosecution's case." *Id.* But the court balanced this standard against the notion that "the error is harmless if the independent evidence of guilt is strong enough to sustain the defendant's conviction beyond a reasonable doubt." *Id.*

The Sixth Circuit's interpretation of the appropriate manner of applying the harmless error standard differs markedly. In *United States v. Taylor*, 13 F.3d 986, 990 (6th Cir. 1994), that court stated that, in the context of Jencks Act violations, harmless error "depends on whether the error in one that might reasonably be thought to have had 'substantial and injurious effect or influence' on the jury verdict." *Id.* (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). This Court has further clarified that "[s]ince courts cannot speculate whether [Jencks material] could have been utilized effectively at trial, . . . the harmless-error doctrine must be strictly applied in [Jencks] Act cases." *Goldberg v. United States*, 425 U.S. 94, 111 (fn. 21) (1976).

In *Wallace*, the Ninth Circuit acknowledged that even in the face of physical evidence, Jencks Act violations may well constitute reversible error. 848 F.2d at 1467. In that case, although no drugs were recovered, the defendants were found to have in their possession a vast array of materials associated with drug dealing and were convicted as a result. *Id.* This evidence notwithstanding, the court recognized that the Government's failure to produce evidence under Jencks constitutes reversible error when the evidence relates to a crucial Government witness. *Id.* at 1471. The court pointed out that the jury's verdict depended on whether it believed the cooperating witness or whether it believed the testimony of Appellant Wallace. *Id.* at 1471-72. Therefore, "[a]ny statements in [the witness's] notes that might have impeached her

testimony might also have tipped the balance of persuasion in favor of appellants." *Id.* at 1472.

The present case is no different from *Wallace* in this regard. Johnson was the only civilian witness and the defense's theory of the case was that Johnson, through a mutual acquaintance named "Monty," transferred his stash of narcotics to Mr. Colette after learning that his house was going to be raided. Johnson admitted to knowing Monty and even acknowledged that Monty is the individual who introduced him to Mr. Colette. (TR III, 8/1/06, Pg. 241, Ln. 1-13). Counsel for Mr. Colette conducted an entire line of questioning about Monty, including the fact that Monty was on the run at the time of the trial and that Monty was upset with Johnson for telling the police that there were drugs in Mr. Colette's residence. (TR III, 8/1/06, Pg. 241-243). Even Sgt. Wall admitted that Johnson had mentioned Monty to him and that he had cleaned out his house before the police arrived which adds further support to the defense's theory of the case. (TR III, 8/1/06, Pg. 199, Ln. 8-17). Any impeachment or exculpatory evidence related to Johnson would have assisted the defense in damaging Johnson's credibility making his awkward and evasive answers to defense counsel's questions highly suspect. This would have undoubtedly influenced the course of the trial.

Under any of the standards described above, the denial of the Johnson recordings to the defense constitutes error that cannot be deemed harmless. This Court should nonetheless utilize this case to establish

guidelines across the country regarding the correct application of the harmless error rubric.

V.

CONCLUSION

For the foregoing reasons, Petitioner Jason Scott Colette requests that this Petition for Writ of Certiorari be granted.

Dated: February 22, 2011

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JASON SCOTT COLETTE, Defendant-Appellant.	No. 07-30127 D.C. No. CR-05-00042-RRB MEMORANDUM* (Filed Aug. 17, 2010)
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JASON SCOTT COLETTE, Defendant-Appellant.	No. 07-30371 D.C. No. CR-05-00042-f-RRB
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JASON SCOTT COLETTE, Defendant-Appellant.	No. 08-30392 D.C. No. 4:05-cr-00042-RRB

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the District of Alaska
Ralph R. Beistline, Chief District Judge, Presiding

Argued and Submitted July 28, 2010
Anchorage, Alaska

Before: SCHROEDER, O'SCANNLAIN and CLIFTON, Circuit Judges.

Defendant-Appellant Jason Colette appeals his jury convictions for possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B), and distribution of cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). He also appeals from the administrative forfeiture of a jet ski and trailer, and the criminal forfeiture of $38,848 in cash, following a jury trial. He raises numerous issues on appeal, none of which have merit. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

The most serious issue is whether we must reverse because the government violated the Jencks Act, 18 U.S.C. § 3500, by failing to timely produce (1) an audio tape of a police interview with a confidential informant; (2) the grand jury testimony of a federal agent; and (3) the handwritten notes the agent took during a different interview with the informant. The government did not violate the Jencks Act when it failed to produce the audio tape of the informant's police interview during the criminal trial, because the tape was in the exclusive possession of state authorities. *See* 18 U.S.C. § 3500(b) (requiring the government to produce any statement of a witness "in the

possession of the United States"); *Beavers v. United States*, 351 F.2d 507, 509 (9th Cir. 1965) (Jencks Act did not apply to a recording that was in the possession of state authorities).

The district court found no violation with respect to the grand jury testimony, but the government now concedes its failure to supply Colette with the agent's grand jury testimony violated the Jencks Act. *See* 18 U.S.C. § 3500(b), (e)(3). The government's failure to turn over the agent's notes of his interview with the informant violated the Act as well. *See United States v. Andersson*, 813 F.2d 1450, 1459 (9th Cir. 1987) ("[U]nder the Jencks Act, an agent's original interview notes with the suspect or potential witness must be preserved or produced.").

The district court should have stricken the agent's testimony from the record of the criminal trial as a sanction for the government's Jencks Act violations. *See* 18 U.S.C. § 3500(d); *United States v. Cardenas-Mendoza*, 579 F.3d 1024, 1031 (9th Cir. 2009). The court's failure to do so, however, could not have made a difference in the case and was therefore harmless. The agent's testimony played only a limited role in Colette's criminal trial and was primarily geared toward proving the elements of the two firearm possession offenses of which Colette was acquitted. To the extent his testimony related to drug trafficking crimes, there was substantial evidence of Colette's guilt independent of the agent's testimony. *See Cardenas-Mendoza*, 579 F.3d at 1032-33.

The government did not violate its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to timely disclose to the defense the audio recording of the first interview of the informant and the agent's notes from the later interview with the informant. These materials had little impeachment value, and there is no reasonable probability they would have affected the result had the government timely produced them. *See United States v. Bagley*, 473 U.S. 667, 682 (1985).

The district court properly denied Colette's motions for a *Franks* hearing. Colette did not make any showing that the purported misrepresentations or omissions by the state trooper during the warrant hearing before the state magistrate were made deliberately or with reckless disregard for the truth. *See Franks v. Delaware*, 438 U.S. 154, 155-56 (1978); *United States v. Stanert*, 762 F.2d 775, 780-81 (9th Cir. 1985). Had the state trooper corrected the alleged misrepresentations and supplied the omitted facts, the magistrate still would have found probable cause for the issuance of the search warrant. *See Franks*, 438 U.S. at 156; *United States v. DeLeon*, 979 F.2d 761, 764 (9th Cir. 1992).

The district court did not abuse its discretion in limiting cross examination. The names of other drug dealers the informant used were not relevant, the information's probative value was outweighed by the informant's substantial interest in his own safety and the avoidance of self-incrimination, and the limitation did not deprive the jury of sufficient information to

assess the informant's credibility in light of the numerous other ways he was impeached. *See United States v. Larson*, 495 F.3d 1094, 1103 (9th Cir. 2007) (en banc). The confidential informant refused to answer questions related to his other sources of drugs, and even if the refusal could be viewed as an invocation of his Fifth Amendment rights, exclusion of his testimony was not warranted because the answer to those questions affected only collateral matters. *See Denham v. Deeds*, 954 F.2d 1501, 1503 (9th Cir. 1992).

Before the administrative forfeiture of the jet ski and trailer, the DEA sent notices of the seizure of this property by certified mail to Colette's home address, his jail address, and his attorney. These notices were "reasonably calculated under all the circumstances" to apprise Colette of the pendency of the property's forfeiture. *See Dusenbery v. United States*, 534 U.S. 161, 168-73 (2002). The record further demonstrates that Colette and his attorney received these notices. There is no basis for setting aside the administrative forfeiture of these items of property under 18 U.S.C. § 983(e)(1), and there was no due process violation.

The district court also properly forfeited the $38,848 in cash. The evidence was sufficient to establish that Colette used, or intended to use, the cash "in any manner or part" to commit or facilitate his possession of cocaine with intent to distribute. *See* 21 U.S.C. § 853(a)(2). The court did not abuse its discretion in refusing to give Colette's proffered instruction on criminal forfeiture; it related to a "proceeds"

theory of forfeiture on which the government did not rely during the forfeiture trial.

AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

USA v. JASON SCOTT COLETTE

DATE: August 27, 2009 CASE NO. 4:05-CR-0042-RRB

THE HONORABLE RALPH R. BEISTLINE

PROCEEDINGS:

MINUTE ORDER FROM CHAMBERS
DENYING MOTION FOR NEW TRIAL

(Filed Aug. 27, 2009)

The Court hereby **DENIES** Defendant's Motion for New Trial and Production of *Jenks* Material, at Docket 377, for the reasons set forth by the Government in its Opposition at Docket 380.

Although there was unfortunate confusion in this matter, there is no basis for the relief Defendant seeks. Moreover, the evidence of guilt produced at trial was overwhelming.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, vs. JASON SCOTT COLETTE, Defendant.	Case No. 4:05-cr-0042-RRB ***ORDER DENYING MOTION FOR NEW TRIAL*** (Filed Sep. 30, 2008)

Before the Court, at Docket 345, is Defendant with a Motion for New Trial. The motion is opposed by the Government at Docket 361. Defendant filed his reply at Docket 364.

The Court has reviewed all of the relevant pleadings and was the trial judge in both the initial trial and the subsequent forfeiture trial.

It is clear that the undisclosed information Defendant complains of is largely cumulative. Moreover, timely disclosure would not have effected the outcome of the trial. The direct physical evidence against Defendant was extensive and proof of guilt was clear.

Based thereon, and for the reasons set forth in the Government's opposition memorandum, Defendant's Motion for a New Trial is hereby **DENIED.**

ENTERED this 30th day of September, 2008.

S/ RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

District of Alaska

UNITED STATES OF AMERICA	***AMENDED* JUDGMENT IN A CRIMINAL CASE**
V.	(Filed Sep. 28, 2007)
JASON SCOTT COLETTE	Case Number: 4:05-CR-00042-01 RRB
	USM Number: 14774-006
	David J. Cohen Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) after a plea of not guilty. 1 and 2 of the Indictment and *6 and 7 of the Indictment

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 841	Possession With Intent to Distribute Cocaine	11/28/2005	1
21 U.S.C. § 841	Distribution of Cocaine	11/18/2005	2

*21 U.S.C. § 853	Criminal Forfeiture – $38,848.00 in US Currency	11/28/2005	6
*21 U.S.C. § 853	Criminal Forfeitures	11/28/2005	7

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

X The defendant has been found not guilty on count(s) 3 and 4 of the Indictment

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

March 23, 2007
Date of Imposition of Judgment

REDACTED SIGNATURE

RALPH R. BEISTLINE, U.S. DISTRICT JUDGE
Name and Title of Judge

September 28, 2007
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

96 Months
The term consists of 96 months each on counts 1 and 2, all such terms to run concurrently.

X The court makes the following recommendations to the Bureau of Prisons:

That the Defendant be placed at FCI Sheridan.

That the Defendant participate in the 500 Hour RDATP Program.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY
UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

5 Years

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed 12 tests per month as determined by the probation officer.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use distribute, or administer any controlled substance, or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall

not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following special conditions:

1. The defendant shall cooperate in the collection of a DNA sample from the defendant as directed by the probation officer.

2. In addition to submitting to drug testing in accordance with the Violent Crime Control and Law

Enforcement Act of 1994, the defendant shall participate in either or both inpatient or outpatient treatment programs approved by the United States Probation Office for substance abuse treatment, which program shall include testing to determine whether the defendant has reverted to the use of drugs or alcohol. At the direction of the probation officer, the defendant may be required to pay for all or a portion of any treatment program.

3. The defendant shall submit to a warrantless search of person, residence, vehicle, personal effects, place of employment, and other property by a federal probation or pretrial services officer or other law enforcement, based upon reasonable suspicion of contraband or a violation of a condition of supervision. Failure to submit to a search may be grounds for revocation.

4. The defendant shall provide the probation officer access to any requested financial information, including authorization to conduct credit checks, and shall not incur any new debts or apply for credit without the prior approval of the probation officer.

5. The defendant shall not possess a firearm, destructive device or other weapon.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 200.00	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$ 0	$ 0	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the
☐ fine ☐ restitution.

☐ the interest requirement for the
☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A X Lump sum payment of $ 200.00 due immediately, balance due

☐ not later than _____, or
X in accordance ☐ C, ☐ D, ☐ E, or X F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D or, ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

X The defendant shall forfeit the defendant's interest in the following property to the United States:

**$38,848.00 in United States Currency; the Ingram Model 10A1 Machine Gun; the 7.62x39 Colt Sporter Rifle and the Mossberg Model 500A Shotgun.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT

District of Alaska

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
V.	(Filed Mar. 30, 2007)
JASON SCOTT COLETTE	Case Number: 4:05-CR-00042-01 RRB
	USM Number: 14774-006
	David J. Cohen Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) 1 and 2 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense	Count
21 U.S.C. § 841	Possession With Intent to Distribute Cocaine	11/28/2005	1
21 U.S.C. § 841	Distribution of Cocaine	11/18/2005	2

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is

imposed pursuant to the Sentencing Reform Act of 1984.

X The defendant has been found not guilty on count(s) 3 and 4 of the Indictment

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

March 23, 2007

REDACTED SIGNATURE

RALPH R. BEISTLINE,
U.S. DISTRICT JUDGE
Name and Title of Judge

March 23, 2007
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

96 Months

This term consists of 96 months each on counts 1 and 2, all such terms to run concurrently.

X The court makes the following recommendations to the Bureau of Prisons:

That the Defendant be placed at FCI Sheridan.

That the Defendant participate in the 500 Hour RDATP Program.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

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Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY
UNITED STATES MARSHAL

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5 Years

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The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed 12 tests per month as determined by the probation officer.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

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2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use distribute, or administer any controlled substance, or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall

not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

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1. The defendant shall cooperate in the collection of a DNA sample from the defendant as directed by the probation officer.

2. In addition to submitting to drug testing in accordance with the Violent Crime Control and Law

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3. The defendant shall submit to a warrantless search of person, residence, vehicle, personal effects, place of employment, and other property by a federal probation or pretrial services officer or other law enforcement, based upon reasonable suspicion of contraband or a violation of a condition of supervision. Failure to submit to a search may be grounds for revocation.

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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 200.00	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$ 0	$ 0	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A X Lump sum payment of $ 200.00 due immediately, balance due

☐ not later than _____ , or
X in accordance ☐ C, ☐ D, ☐ E, or X F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D or, ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JASON SCOTT COLETTE, Defendant-Appellant.	No. 07-30127 D.C. No. CR-05-00042-RRB District of Alaska, Fairbanks ORDER (Filed Nov. 22, 2010)
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JASON SCOTT COLETTE, Defendant-Appellant.	No. 07-30371 D.C. No. CR-05-00042-f-RRB District of Alaska, Fairbanks
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JASON SCOTT COLETTE, Defendant-Appellant.	No. 08-30392 D.C. No. 4:05-cr-00042-RRB District of Alaska, Fairbanks

Before: SCHROEDER, O'SCANNLAIN and CLIFTON, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Defendant-Appellant's petition for panel rehearing and petition for rehearing en banc are denied.

Statute at issue in this Petition: 18 U.S.C. §3500

§ 3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the

court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means –

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.